Supreme Court of the United States.

No. 167.—October Term, 1904.

The Middletown National Bank
vs.
Toledo, Ann Arbor and Northern Michigan Railway Company et al.

On a certificate from the United States Circuit Court of Appeals for the Second Circuit.

[April 3, 1905.]

This case comes here by virtue of a certificate from the United States Circuit Court of Appeals for the Second Circuit, which sets forth the following facts:

The case came before the Circuit Court of Appeals by appeal from the decree of the United States Circuit Court for the Southern District of New York, sustaining demurrers to the bill of complaint and dismissing the bill. The complainant in the bill was a creditor of the railway company, (the defendant,) which is a corporation created under the laws of the State of Ohio, and complainant recovered a judgment against the defendant railway company in the Supreme Court of the State of New York, upon which execution was issued and returned unsatisfied. The complainant then brought its bill in equity in the United States Circuit Court for the Southern District of New York, for the benefit of itself and other creditors, against numerous stockholders of the railway company, defendant, residing in the district, to enforce the liability of those stockholders for the debts of the railway company, under the laws of Ohio, and that company was made a party defendant.

The Constitution of Ohio (1851), Article 13, section 3, is as follows:

"Dues from corporations shall be secured by such individual liability of the stockholders, and other means, as may be prescribed by law; but in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock."

In pursuance of this provision of the constitution the legislature of Ohio adopted statutory provisions with respect to the stockholders of certain corporations which appear in the Revised Statutes of 1880, section 3258, in the following form:

"The stockholders of a corporation which may be hereafter formed, and such stockholders as are now liable under former statutes, shall be deemed and held liable, in addition to their stock, in an amount equal to the stock by them subscribed, or otherwise acquired, to the creditors of the corporation, to secure the payment of the debts and liabilities of the corporation."

Section 3260 of the Revised Statutes of 1880, as amended in 1894, provided as follows:—

"A stockholder or creditor may enforce such liability by action jointly against all the holders or owners of stock, which action shall be for the benefit of all the creditors of the corporation, and against all persons liable as stockholders; and in such actions there shall be found and determined the amount payable by each person liable as stockholder on all the indebtedness of the corporation, in which adjudication no costs shall be taxed to nor collected of any stockholder to an amount which, together with the amount to be paid on said indebtedness, will exceed the amount of the stock on which he is liable, provided, that in any such action, the plaintiff may file in the court a sworn statement that a stockholder or stockholders or the legal representatives of a deceased stockholder have not been summoned, giving their residence if known, and that it is impracticable to secure service of summons upon such stockholders or such legal representatives of a stockholder, and remitting from the claims of the plaintiff or of other creditors consenting, so much as may be found payable by such stockholders not served with summons except those who may be insolvent or non-resident of the State, and judgment shall be rendered against the stockholders who have been served with summons for the *pro rata* amount for which they would be liable if all solvent stockholders resident of the State were served with summons; and when a creditor has prosecuted against a corporation an action of (at) law begun before any action to enforce the stockholders' liability, and has recovered final judgment only after such an action to enforce the stockholders' liability has been prosecuted to a final decree in the court in which the action was commenced, such judgment creditor may bring a like action against the stockholders of the corporation to enforce such judgment at any time within four years after the recovery of his said judgment, but the stockholders shall not be liable for any amount in excess of that provided in section 3258."

As so amended this section stood at the time when this suit was begun. Afterwards, in 1900, but before the filing of the second amended bill of complaint, the section, as further amended and supplemented, provided as follows:

"Section 3260. Whenever any creditor of a corporation seeks to charge the directors, trustees or other superintending officers of a corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any common pleas court which possesses jurisdiction to enforce such liability.

"Section 3260 (*a*). The court shall proceed thereon, as in other cases, and, when necessary, shall cause an account to be taken of the property and obligations due to and from such corporation, and may appoint one or more receivers.

"Section 3260 (*b*). If, on the coming in of the answer or upon the taking of such account, it appears that such corporation is insolvent, and has not sufficient property or effects to satisfy such creditor, the court may proceed to ascertain the respective liabilities of the directors, officers and stockholders, and enforce the same by its judgment, as in other cases.

"Section 3260 (*c*). In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is in-

sufficient to discharge its debts, the court shall give notice to non-resident stockholders, as provided in sections 5048, 5049, 5050, 5051, or 5052 of the Revised Statutes and shall first proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

"SECTION 3260 (*d*). If the debts of the company remain unsatisfied the court shall proceed to ascertain the respective liabilites of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment as in other cases. The court may authorize and direct the receiver to prosecute such action in his own name as receiver, as may be necessary, in other jurisdictions to collect the amount found due from any officer or stockholder.

"SECTION 3260 (*e*.) Whenever any action is brought against any corporation, its directors or other superintending officers, or stockholders, according to the provisions of this chapter, the court, whenever it appears necessary or proper, may order notice to be published in such manner as it shall direct, requiring all creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment.

"SECTION 3260 (*f*). Upon a final judgment in any such action against an insolvent corporation, the court shall cause a just and fair distribution of the property and assets of such corporation or the proceeds thereof to be made among its creditors.

"SECTION II. That said section 3260 be, and hereby is, repealed.

"SECTION III. This act shall apply to pending actions and shall take effect and be in force from and after its passage."

The court below sustained the demurrer on the following ground:

"It is thought that the question raised by this demurrer should be decided upon the assumption that the action is the one provided for by sec. 3260, R. S. Ohio, as it stood after the amendment of 1894. Inasmuch as that section expressly provides for an action jointly against all the stockholders, including such as are out of the jurisdiction or for other causes cannot be served, and the complaint avers that there are stockholders who have not been made parties, there is a lack of parties defendant and the demurrer is sustained. If, moreover, the amendments of the statute passed in 1900 are to be considered, the position of the demurrants is even stronger. Manifestly this action is not the one thereby provided for."

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The questions propounded by the Circuit Court of Appeals are the following:

First. Whether Article XIII, section 3, of the constitution of Ohio is so far self-executing that it may be enforced outside of the jurisdiction of

said State without compliance with said requirements of section 3260 of the Revised Statutes of said State as amended in 1894.

Second. Whether Article XIII, section 3, of the constitution of Ohio is so far self-executing that it may be enforced outside of the jurisdiction of said State without compliance with said requirements of section 3260 of the Revised Statutes of said State as amended in 1900.

The counsel for the complainant contends that the article of the Ohio constitution, above set forth, is self-executing to the extent of declaring the general contractual obligation and the general rule as to property rights, and it is insisted that the liability of the stockholders in the railway corporation may be enforced by the courts of another jurisdiction without compliance with the requirements of any of the statutes which have been passed by the legislature of Ohio in regard to the enforcement of the liability provided for in the constitution. These statutes, it is said, refer only to the form and mode of procedure in local courts, and neither of them contains any limitation or condition imposed upon the substantive right declared by the constitution, as construed and enforced by the Ohio courts for many years prior to the statutory enactments.

We have not been referred to any decision of the Ohio Supreme Court directly involving the question whether the provision of the constitution referred to is self-executing or not. If there were any such decision we should follow it. That court has, however, regarded the liability of stockholders as statutory in its nature, as is seen from its decisions in the cases hereinafter cited.

The question has arisen in some of the other States regarding this same provision, and it has been held to be not self-executing. (*Barnes* v. *Wheaton*, 87 Supreme Court Reports of New York, [80 Hun. 8.]) In that case it was held by the Appellate Division that it was obvious that the provision was not self-executing, but its purpose was to confer upon the legislature the power and impose upon it the duty of securing dues from corporations by imposing upon the stockholders of such corporations as are organized under the laws of that State an individual liability, and by such other means as, in its discretion, it should deem proper, but limiting such power and discretion by the provision that each stockholder should be made liable to an amount at least equal to the amount of stock held by him. This provision was not regarded as imposing a liability independent of the statute, nor as conferring upon the plaintiff any right to maintain the action then before the court. It has been held substantially to the same effect in *Nimick & Co.* v. *Mingo Iron Works Co.*, (25 W. Va. 184.)

But whether the constitutional provision might be regarded as, to a certain extent, self executing in the absence of any statute on the subject, we find that the legislature of Ohio has passed statutes to enforce such liabi.

lity. The cases of *Wright* v. *McCormack*, (17 Ohio St. 86,) and *Umsted* v. *Buskirk*, (Id. 113,) were both brought under a statute enacted to provide a method for enforcing the constitutional liability, and in the former case the court speaks of the liability of the stockholders, as a "statutory liability," and of the statute itself as a "statute under which the liability arises." That was an early statute, passed not long after the adoption of the constitutional provision, and for the purpose of executing it. (50 O. L. 296, passed May 1, 1852.) *Wright* v. *McCormack* was approved in *Umsted* v. *Buskirk*, *supra*. Subsequent statutes were passed for the same purpose of enforcing the liability of stockholders, and those set out in the record not only definitely state the liability, but give the procedure and provide the remedy in order to enforce it. It will be seen that the constitutional provision refers in terms to the securing of dues from corporations by the individual liability of stockholders and by such other means as may be prescribed by law. The constitution evidently looks to the legislature for providing means. A statute which is passed in pursuance of such a provision and which itself provides for the procedure and states the remedy, even though imposing no limit or conditions in regard to such liability other than such as are found in the constitutional provision itself, is, nevertheless, a statute providing a remedy which is to be followed within the principle sustained by the authorities cited below. The statute under such circumstances may be said to so far provide for the liability and to create the remedy, as to make it necessary to follow its provisions and to conform to the procedure provided for therein. See *Ballard* v. *Bailey*, (20 Wall. 520, 526;) *Bank* v. *Francklyn*, (120 U. S. 747, 756, 758;) *Evans* v. *Nellis*, (187 Id. 271;) *Morley* v. *Thayer*, (3 Fed. Rep. 737, Circuit Court, District of Massachusetts;) *Cleveland &c. Co.* v. *Kent*, (94 N. Y. Supreme Court Reports, [87 Hun.] 329;) *Nimick* v. *Mingo Iron Works Co.*, *supra*. *In Bank* v. *Francklyn*, (*supra*,) Mr. Justice Gray, speaking for this court, said: "In all the diversity of opinion in the courts of the different States, upon the question how far a liability, imposed upon stockholders in a corporation by the law of the State which creates it, can be pursued in a court held beyond the limits of that State, no case has been found in which such a liability has been enforced by any court, without a compliance with the conditions applicable to it under the legislative acts and judicial decisions of the State which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the State to a greater burden than domestic stockholders." In order to comply with the conditions of the statute of Ohio it seems plain from the provisions of the statute that the action must be brought in that State.

In the case now before us the complainant has paid no attention to the statutes of Ohio, so far as bringing suit in that State is concerned, and

therefore has not followed the provisions contained in them. It has commenced no action in the State of Ohio, but, on the contrary, assumes to ask the Federal Circuit Court in New York State to administer the relief asked for in its bill, against stockholders who are residents of New York, the same as if the suit had been commenced in Ohio. This, we think, the complainant could not do. By the terms of the Ohio statute, properly construed, the remedy must be pursued in the courts of that State. The case of a plaintiff failing to obtain satisfaction of his judgment by following, in Ohio, the remedies given by the Ohio statute, is not before us, and we need not determine the character of any other remedy, or where it may be enforced.

We therefore answer the first question in the negative. It is unnecessary to answer the second question. The answer will be certified to the Circuit Court of Appeals for the Second Circuit.

So ordered.

True copy.

Test:

Clerk Supreme Court, U. S.